STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. CUM-15-558

MARIE GUNNING
Appellant

v.

JOHN DOE
Appellee

ON APPEAL FROM THE SUPERIOR COURT
CUMBERLAND COUNTY

BRIEF OF APPELLEE

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STATEMENT OF FACTS

Appellant Marie Gunning is a politician complaining about statements published about her in a local parody newspaper, the Crow's Nest, which is written and published anonymously.

Gunning was a 2012 candidate for the Freeport, Maine Town Council A. 18 (Compl. ¶ 23) (referring to "Plaintiff's 2012 campaign for Town Councilor"). She has also, "from time to time, participated as a private citizen in the local politics of the Town . . . ." A. 16 (Compl. ¶ 10).

The Crow's Nest is "an anonymous single sheet newsletter published and circulated in Freeport, Maine and on the internet." A. 15 (Compl. ¶ 3). Nowhere in the publication itself or on its website is there "any indication of who owns, publishes or contributes" to it. A. 16 (Compl. ¶ 7). It is published and circulated "sporadically and does not maintain a consistent publication schedule." A. 15. (Compl. ¶ 4). It has appeared intermittently for the past 25 years in Freeport. A. 94.

Its masthead announces that the Crow's Nest is parody, describing itself as "a parody look at the news." A. 26-69. This disclaimer appears on the first page at the top of each issue below the "Crow's Nest" title in a distinctive cursive script not found elsewhere in the publication. *See, e.g.,* A. 26, 28, 30. A number of articles in the Crow's Nest repeat that same

message, referring to it as a "parody news letter" (sic) (A. 28, A. 33), as a "news parody" (A. 30), and as a "parody publication" (A. 59). It is intended to parody local politicians, public figures, politics, and events. A. 94.

The content of the newsletter lives up to its billing as a "parody look at the news." The issues of the Crow's Nest attached to the complaint show that it employs parody, satire, humor, and hyperbole to ridicule and criticize local politicians and town government. A. 26-69 (Compl. Ex. 1-16). It juxtaposes humorous, ridiculous or exaggerated images, often of politicians and movie stars, with references to and discussion about local political figures and town officials. The articles contain absurd statements and silly made-up quotations and headlines.

Because the complaint attaches sixteen issues of the Crow's Nest, it is not reasonably possible to go through each issue in detail. A few examples provide a representative flavor of its content. On the first page of the first issue attached to the complaint as Ex. 1 the Crow's Nest purports to profile members of the Freeport Town Council, but instead of their photographs prints images of Ming the Merciless from the 1980 Flash Gordon film (upper left corner), the Scarecrow from the 1939 Wizard of Oz film (lower left corner), the Wicked Witch of the West, also from the Wizard of Oz (upper right corner), and former Wisconsin Senator Joseph McCarthy

(middle right). A. 26. It lists fabricated nicknames and political slogans associated various individuals, including (next to the photo of Ming the Merciless), "Ken 'the Man', Mann" a/k/a "The Screaming Skull," "The Political Kiss of Death," and "The Grand Wizard." *Id.*

Next to a profile of Marie Gunning, the Crow's Nest prints the image of the Wicked Witch of the West and lists as her aliases "Gunner Gunning" and "Miss Prozac 2003" along with a political slogan "shoot 'em all let God sort 'em out." *Id.* She is then quoted as saying that she lost a recent election because of a "secret" vote against her, a conspiracy, and that she intends to challenge the "whole Election process." *Id.* In response to "persisting rumors that she is abusing mood altering Drugs," she is quoted as replying that she only uses "what my Doctors prescribe for me" and inviting the public to contact her "Attorney or Doctor" for answers to "more questions." *Id.*

The next section of the same article profiles "Eric 'Paranoia' Pandora" a/k/a "Tail Gunner" and "The commie Hunter" juxtaposed with a photo of former Senator Joseph McCarthy and reports on a fruitless hunt by Mr. Pandora for his stolen political signs at Freeport's Highway Garage. *Id.* "No signs were found." *Id.*

The first page of the next issue of the Crow's Nest (Compl. Ex. 2) is stamped "Top Secret," "Eyes Only," and "Classified" and reports that "an ad hoc political action committee petitioned the Freeport Town Council" to ban the Crow's Nest and to boycott any local business allowing the Crow's Nest to be circulated from its property. A. 28. The next page refers to Town Council meetings as "Dinner Theater" and invites the public to secure tickets for "whimsical flight of fancy" with "puppet master Ken Mann" orchestrating "the evenings follies, you'll laugh' you'll cry, you'll cringe but you will be entertained." (sic) A. 29. "Watch Marie Gunning stamp her GO GUNNING run for the 2012 council seat. Gasp as she slices and dices with her rapier wit, while building the BIG MO." *Id.* The article goes on to offer other teasers of the upcoming attraction, including: "Hear Peter Thompson preach hell fire as he attacks the Chairman and demands the Managers head on a plate." *Id.*

The first page of another issue of the Crow's Nest (Compl. Ex. 16) is a parody report on Marie Gunning's reaction to having lost an election for Town Council. A. 67. Just below the phrase "a parody look at the news" the headline "Lindsay Lohan Freeport's Own Marie Gunning" appears, followed by various photos of the Hollywood star. The article starts off by reporting that the "last lost election has not slowed Marie Gunning down

one bit," and that she is back and more determined than ever, "[w]ith the iron will and force of a bulldozer." *Id.* She is reported to boast about having driven "the crooked dirt bag manager out of town," and to promise that the Town Council "is next." *Id.* The article then lampoons her as nuts. "Rumors continue that Marie is suffering from a bipolar disorder with acute depression and paranoid, amplified by substance abuse." *Id.* She is reported to deny these rumors, saying "it's just the same rotten people, my opponents, always trying to discredit me and stop me from exposing the truth!" *Id.* She is then quoted attacking Town employees for approving anything that the Town Council wants because of a conflict of interest. A. 67-68.

The following article, on the same page, reports that the Freeport Fire Department "is now in the Whoopie business and we're not talking about pies." A. 67. That article reports on "conjugal activities" at sleep over nights at the Freeport Fire/Rescue station. The last page of the same issue ends with an image of a bumper sticker that says, "Let's Vote *Ourselves* RICH!" A. 69.

The Crow's Nest is non-commercial. It is available for free in paper copy at local stores, coffee shops, and at municipal buildings. A. 15 (Compl. ¶ 5). It is also available on the internet. *Id.* It does not sell products or

accept advertisements. *See* A. 26-69 (editions of the Crow's Nest attached to Complaint, none of which contain advertisements).

PROCEDURAL HISTORY

Gunning filed her complaint against "John Doe" on August 14, 2013 (A. 1), and less than a week later "obtained a witness subpoena from the San Francisco[, California] Superior Court, directed to an entity known as Automattic, Inc., the company that hosts the Crow's Nest website" (A. 104). The subpoena sought information concerning the identities of the persons associated with the website, including names, e-mail addresses, and internet protocol addresses. *Id.* Automattic provided notice of the subpoena to the John Doe parties, and litigation followed in the Superior Court of California, County of San Francisco, Case No. CPF-13-513271.

The docket sheet for the California proceeding is attached as Addendum at 1 and is a proper subject for judicial notice.[1] It lists the sequence of events in that jurisdiction. *Id.* John Doe filed a petition to quash the subpoena on Automattic on October 18, 2013. *Id.* Gunning filed a memorandum in opposition on November 8. *Id.* John Doe replied on

[1] The Court may properly take judicial notice on appeal of California court records. *See State v. Taylor*, 1997 ME 81, ¶ 10, 694 A.2d 907, 910-11 ("This Court may properly take judicial notice on appeal."); *King v. King*, 2013 ME 56, ¶ 4 n. 1, 66 A.3d 593, 595 (taking judicial notice of federal court dockets). The docket associated with this case can be viewed at no charge at the Superior Court of California, County of San Francisco website. *See* http://www.sfsuperiorcourt.org/online-services (last visited April 27, 2016). The Addendum to this brief attaches a copy of the relevant docket sheet printed off the court's website.

November 15. *Id.* Judge *Pro-Tem* Rebecca L. Woodson heard argument on November 22. *Id.* A. 103 (referring to argument held on November 22 with "[a]ll parties appearing" through "their counsel of record"). Judge Woodson issued a decision granting the Petition to Quash. A. 103-107.

Her decision summarizes the parties' positions. The position taken by John Doe was that "the subpoena should be quashed in its entirety because it intrudes on Petitioner's constitutional right to speak anonymously." A. 105. Under *Krinsky v. Doe 6,* 159 Cal.App.4th 1154, 1172 (2008), anonymous speech is protected under California law unless a defamation plaintiff makes a prima facie showing of libel. Thus, Gunning argued that she had "made a prima facie showing of libel . . . ." A. 105. John Doe responded that "the statements at issue, when read in context, could not be taken by a reasonable reader as serious news reporting, or anything other than the parody that it is, which is speech protected by the First Amendment." A. 106. The Judge agreed with John Doe:

> While the content of the Crow's Nest could be seen as offensive, rude and distasteful, it is, in this Court's opinion, taking into account the context and content of the statements at issue themselves, parody and not likely to be taken as true by a reasonable person. While the Crow's Nest does mention actual facts on several occasions, the statements highlighted by Gunning at the hearing on the petition do not describe actual facts. For this reason, the speech at issue in the Crow's Nest is protected under the First Amendment of the U.S. Constitution; the statements are not actionable speech such that the identities

> of the website owner and persons who comment or otherwise publish material printed or posted online at the Crow's Nest, or any of the information enumerated in Exhibit A to the subpoena at issue, must be revealed pursuant to the subpoena.

A. 106-107. Having found that Gunning's complaint did not state a prima facie claim, the Court quashed the subpoena and granted John Doe's request for attorneys' fees. A. 107.

Gunning objected to that decision and received a second hearing before a Judge of the California Superior Court (not a Judge *Pro-Tem*) on December 11. Addendum at 1. Judge Marla J. Miller granted the motion to quash and signed an order to that effect in open court. A. 108-109 (order). She ruled:

> In order to overcome Petitioners' motion to quash, Respondent must make a prima facie showing of libel. (*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1172.) Respondent failed to make this prima facie showing. The Court finds that while the content of the Crow's Nest could be seen as rude and distasteful, taking into consideration the context and contents of the statements at issue, it is parody. The speech at issue in the Crow's Nest is protected under the First Amendment to the U.S. Constitution. The statements are not actionable speech such that the identities of the website owner and persons who comment or otherwise publish material printed in or posted online at the Crow's Nest must be revealed pursuant to the subpoena. (See *Hustler Magazine, Inc. v. Falwell* 485 U.S. 46, 57 (1988) [parody is not actionable as defamation if it cannot "reasonably be understood as describing actual fact about [the plaintiff] or actual events in which [she] participated"].)

A. 109. About a month later, in response to John Doe's request for an amended order correcting the caption, another California Judge, Ernest H.

Goldsmith, signed the same order, corrected only as to the caption and to eliminate language that had been struck from the prior order. A. 109-A-110) (amended order).

The California Court's orders permitted John Doe to move for reasonable attorneys' fees. A. 110. This was resolved by the filing of a "Stipulation Regarding Settlement of Attorney's Fees and Costs" on March 5, 2014. Addendum at 1. Gunning did not appeal the California ruling against her.

Undeterred by the California Court's order, Gunning attempted to continue to press for discovery aimed at disclosing the identities of the John Doe parties in Maine. In response, on July 17, 2015, John Doe filed a motion to quash and urged the Court to dismiss the case for failure to file a timely return of service under M.R.Civ.P. 3. A. 70-94. A non-party served with a subpoena *ad testificandum*, Richard Simard, also filed a motion to quash. A. 95-110.

The Superior Court (Warren, J.) granted these motions. A. 8-14. Referring to whether she had stated a prima facie claim against John Doe, the Court found that "Gunning previously litigated that issue in California in the course of her application under California's Interstate Deposition and Discovery Act, when she sought to subpoena information from the company

that hosted the Crow's Nest website." A. 12 (citation omitted). The Court concluded, "whether or not this court agrees with the California ruling, the issue of whether Gunning has made the necessary prima facie showing was actually litigated in California, was decided adversely to Gunning, and was essential to the outcome of the California action." A. 13. "Accordingly, the California decision is entitled to collateral estoppel effect and precludes Gunning from relitigating the same issue here in Maine." *Id.* The Court found that Gunning had not timely filed a return of service as required by M.R.Civ.P. 3 and on that basis dismissed the action. A. 14.

This appeal followed.

ISSUES PRESENTED FOR REVIEW

1. Having already litigated whether she has a prima facie claim against John Doe in California and lost, is Appellant precluded by collateral estoppel/issue preclusion from relitigating that same issue in Maine?

2. Should Maine join the majority of jurisdictions in recognizing that anonymous speakers are entitled to protection from defamation plaintiffs seeking court orders requiring disclosure of their identities?

3. Has Appellant made the heightened showing necessary to compel the disclosure of the identities of the John Doe Appellees engaged in parody speech?

SUMMARY OF THE ARGUMENT

The Superior Court correctly gave full faith and credit to a California Court's decision that Appellant Marie Gunning has not stated a prima facie claim against the anonymous John Doe parties named as defendants. A California Court determined, after briefing and two rounds of oral argument at which all sides were represented by counsel, that the Crow's Nest is non-actionable parody protected by the First Amendment to the United States Constitution. If Gunning had sought to issue a second subpoena in California, another California court would have applied issue preclusion, refused to allow her to relitigate whether she has a prima facie case, and quashed any further subpoenas she might have attempted to enforce in that jurisdiction. A Maine court must, applying California law, do the same with respect to Gunning's Maine subpoena. Having opted to litigate whether the Crow's Nest is non-actionable parody in California, Gunning should not be given a fresh chance to litigate that same issue all over again in Maine.

Should this Court refuse to apply issue preclusion to the California Court's decision, the Superior Court's decision should be affirmed on the alternative ground that Gunning has not made a showing sufficient to compel disclosure of the identities of the John Does. Maine should join the

majority of jurisdictions which have held that anonymous speech enjoys constitutional protection. The Court should only allow disclosure of the identities of anonymous speakers upon a heightened showing by a defamation plaintiff, resolving the issue left upon by this court more than ten years ago in *Fitch v. Doe*, 2005 ME 39, ¶ 26, 869 A.2d 722. If this Court examines the Crow's Nest afresh it should conclude, as did the California Court, that the Crow's Nest is non-actionable parody. Plaintiff has not stated a prima facie claim, and thus has not made a showing sufficient to secure orders to disclose the identity of persons associated with the Crow's Nest. The Superior Court correctly quashed the Maine subpoena.

The Superior Court acted well within its discretion by dismissing this claim for failure to timely file a return of service under M.R.Civ.P. 3. Over two years had elapsed between the filing of the claim and its order dismissing this litigation, which is far more than the default 90 day period for the filing of a return of service authorized under the Rule.

ARGUMENT

I. Standard of Review

The applicability of issue preclusion is a question of law subject to *de novo* review. "A court's conclusion that either issue preclusion or claim preclusion bars a particular litigation is an issue of law reviewed de novo." *Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 7, 940 A.2d

1097. The standard of review on appeal from an order granting a motion to quash a subpoena is ordinarily abuse of discretion, *State v. Marroquin-Aldana*, 2014 ME 47, ¶ 33, 89 A.3d 519, but where a motion is brought to vindicate First Amendment rights the standard is de novo. *Thomson v. Doe*, 356 P.3d 727, 731 (Wa.App. 2015) ("the proper standard of review when considering the trial court's decision on a motion to reveal an anonymous speaker's identity" is *de novo*).

The standard of review on an order dismissing an action for failure to timely file a return of service under M.R.Civ.P. 3 is abuse of discretion. *Maguire Const., Inc. v. Forster*, 2006 ME 112, ¶ 8, 905 A.2d 813 ("When service was insufficient, we review the court's decision whether to dismiss the complaint for abuse of discretion.").

II. Gunning is precluded from re-litigating whether the Crow's Nest is actionable speech in Maine because she already litigated that issue in California.

The Superior Court correctly held that Gunning is precluded from re-litigating whether the statements in the Crow's Nest concerning her are actionable speech because she already litigated that same issue in California. The Court held that "the issue of whether Gunning has made the necessary prima facie showing was actually litigated in California, was

decided adversely to Gunning, and was essential to the outcome of the California action." A. 13.

A. California law governs the extent to which the California court's decision should be given preclusive effect.

As a threshold matter, the Court must address whether to apply California or Maine law to determine the preclusive effect of the California judgment. According to the Restatement (Second) of Conflict of Laws §§ 94-95, the law of the state rendering the judgment determines the preclusive effect of that judgment. "What persons are bound by" and "[w]hat issues are determined by a valid final judgment is determined by the local law of the State where the judgment was rendered." *Id.* §§ 94-95. The Court followed this approach in *DeVlieg v. DeVlieg*, 492 A.2d 605 (1985) by observing that "full faith and credit requires that Maine accord Ohio judgments the same degree of finality as would Ohio." *Id.* at 607; *see also Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 222 (1985) ("The full-faith-and-credit statute requires that federal courts give the same preclusive effect to a State's judicial proceedings as would the courts of the State rendering the judgment."); *Riley v. New York Trust Co.*, 315 U.S. 343, 350 (1942) (holding that "Delaware shall give Georgia judgments such faith and credit 'as they have by law or usage' in Georgia"); *General Foods Corp. v. Mass. Dept. of Public Health*, 648 F. 2d 784, 786 (1st Cir. 1981) (quoting

Restatement (Second) of Conflict of Laws § 94). It follows that Maine courts may not relitigate issues that Gunning would be precluded from relitigating in California by courts in that jurisdiction.

B. All issues decided by the California court should be given collateral estoppel effect.

The doctrine of collateral estoppel, a term used interchangeably with issue preclusion by California courts, "is firmly embedded" in California law. *Murray v. Alaska Airlines, Inc.*, 50 Cal. 4th 860, 864 (2010). The California Supreme Court held that the doctrine "is grounded on the premise that once an issue has been resolved in a prior proceeding, there is no further fact-finding function to be performed." *Id.* (quotation marks omitted). It "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy, by preventing needless litigation." *Id.* The policies served by the doctrine "include conserving judicial resources and promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system, and avoiding the harassment of parties through repeated litigation." *Id.* at 879. This Court has endorsed these same policy goals. *Hostler v. Barry*, 403 A.2d 762, 767 (Me. 1979) (collateral estoppel is meant "to prevent harassing and repetitious litigation, to avoid inconsistent

holdings which lead to further litigation, and to give sanctity and finality to judgments").

The Superior Court correctly noted below that whether it would have reached the same conclusion as the California court is immaterial for purposes of the application of collateral estoppel. It is well established that "collateral estoppel may apply even where the issue was wrongly decided in the first action." *Murphy v. Murphy*, 164 Cal.App.4th 376 (2008); *see also Roos v. Red*, 130 Cal.App.4th 870, 887 (2005) ("An erroneous judgment is as conclusive as a correct one.").

In California, courts determine whether issue preclusion applies based on a five-part test: "First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." *Sabek, Inc. Engelhard Corp.*, 65 Cal.App.4th 992, 997 (1998); *see also S. Sutter, LLC v. LJ Sutter Partners, L.P.*, 193 Cal. App. 4th 634, 661-62 (2011)

(applying these same factors to decision on an award of attorneys' fees under California's anti-SLAPP statute).

Gunning does not dispute that the first, second, third, and fifth elements of this test are met here. First, whether Gunning has stated a prima facie claim was litigated in California and, because the California court examined the very same complaint at issue here, the issue is identical to the one before the Maine courts. Whether the relief requested or the procedural posture differs as between the California case and the Maine case does not change the analysis for purposes of assessing whether the issues are identical. "[T]he doctrine of collateral estoppel depends on what issues are adjudicated, not the nature of the proceeding or the relief requested." *Lumpkin v. Jordan*, 49 Cal.App.4th 1223, 1231 (1996); *see also Miller v. Nichols*, 586 F.3d 53, 60 (1st Cir. 2009) ("The doctrine precludes courts from revisiting factual matters that meet this test, even when a second action seeks a different remedy than the initial litigation.").

Second, the issue was actually litigated in California. "For purposes of issue preclusion, 'an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding.'" *Sutter*, 193 Cal. App. 4th at 662. The California court heard

argument by Gunning and John Doe, the parties submitted the issue for determination, and the Court made a decision. A. 103-110.

Third, the issue was necessarily decided by the California court since its decision to quash the subpoena was based on its finding that Gunning's claim is based on non-actionable parody protected by the First Amendment. As a result, that court held, Gunning had not pled a prima facie case and the subpoena was quashed. A. 110. The California court was required to decide whether Gunning had pled a prima facie claim and did so.

Finally, Gunning is the party against whom preclusion is sought and she herself litigated the issue in California.

In her brief Gunning argues that the Superior Court erred by giving preclusive effect to the California court's decision for three reasons. Blue Br. at 23-30. She argues: (A) that the California court's decision was not final (Blue Br. 23-26); (B) that she did not have an adequate incentive to litigate the matter in California (*id.* 26-28); and (C) that the California judgment involved a determination of law that should not be given preclusive effect (*id.* 28-30). None of these arguments succeed.

1. The California decision is final and on the merits.

Gunning argues that the decision by the California court is merely interlocutory for purposes of appeal and thus has no preclusive effect. Blue Br. 23-26. The California Supreme Court rejected this argument, holding that "finality for purposes of appellate review is not the same as finality for purposes of res judicata." *George Arakelian Farms, Inc. v. Agric. Labor Relations Bd.*, 49 Cal.3d 1279, 1290 (1989).[2] This holding is in line with prevailing law that finality for purposes of issue preclusion should not be confused with finality for purposes of appeal. *See* James Wm. Moore et al., 18 Moore's Federal Practice § 132.93[5][b][i] (3d ed. 2015) (section of treatise titled "Finality and Appealability Are Not Coextensive."); *Metromedia Co. v. Fugazy*, 983 F.2d 350, 366 (2d Cir. 1992) ("the concept of finality for collateral estoppel purposes includes many dispositions which, though not final in that [end of litigation] sense, have nevertheless been fully litigated") (quotation marks omitted); *John Morrell & Co v. Local Union 304A*, 913 F.2d 544, 563 (8th Cir. 1990) ("we believe that

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[2] The California authority cited by Gunning addresses appealability, not finality for purposes of issue preclusion. She cites at Blue Br. 24 *Dana Point Safe Harbor Collective v. Superior Ct.*, 51 Cal.4th 1 (2010), but that case addresses whether an administrative subpoena was subject to appeal, rather than issue preclusion. Further, *Dana Point* undermines Plaintiff's argument that decisions on motions to quash are non-final and unappealable since the California Supreme Court held in that "the trial court's order enforcing the City's legislative subpoenas was a final judgment subject to appeal . . . ." *Id.* at 13.

finality for purpose of appeal . . . is not necessarily the finality that is required for issue preclusion purposes").

Gunning argues that under Maine law "the requirement of finality for the purposes of res judicata" is treated as "equivalent to the requirement of finality for the purposes of appellate review" (Blue Br. 23-24), and cites *Sevigny v. City of Biddeford*, 344 A.2d 34, 38-39 (1975) for that proposition. The first problem with this argument is that California law, not Maine law, applies to determine the preclusive effect to be given to the California court's decision. But even if Maine law applied, *Sevigny* addressed a classic type of tentative decision, an "order granting or denying a temporary injunction." *Id.* at 39. Such decisions are preliminary in nature and thus the general rule is that "[f]indings made in a preliminary injunction proceeding are seldom considered sufficiently final to be given issue preclusive effect." James Wm. Moore et al., 18 Moore's Federal Practice § 132.93[5][b][ii] (3d ed.2015). Trial judges can revisit rulings made at the preliminary injunction stage at the trial on the merits. *cf.* M.R.Civ.P. 65(a)(2) (allowing but not requiring consolidation of hearing on an application for preliminary injunction with trial on the merits). In general it makes little sense for other courts to give preclusive effect to preliminary rulings on injunctions when the judges issuing those rulings

themselves treat their own decisions as preliminary. This case does not involve the preclusive effect to be given a preliminary injunction ruling – Gunning's subpoena was quashed once and for all by the California Court – and *Sevigny* is therefore inapposite.

Under the applicable California standard for determining the finality element of issue preclusion, a standard Gunning does not brief, the California Superior Court decision was a final decision on the merits. The question for purposes of determining the finality of a decision under California law is whether "an issue of law or fact" has been "reserved for future determination." *George Arakelian,* 49 Cal. 3d at 1290. For purposes of issue preclusion, a decision is final on the merits where the adjudication is "sufficiently firm" to be accorded preclusive effect. *Sutter*, 193 Cal. App. 4th at 663.[3] "A prior adjudication of an issue in another action may be deemed 'sufficiently firm' to be accorded preclusive effect based on the following factors: (1) whether the decision was not avowedly tentative; (2)

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[3] The California Court of Appeal, opinion in *S. Sutter, LLC v. LJ Sutter Partners, L.P.* provides relevant guidance. In that case the issue was whether a decision granting attorneys' fees in connection with a successful anti-SLAPP motion to dismiss should be given preclusive effect. The Court of Appeal held that "the attorney fees decision [was] a final judgment for direct estoppel purposes." *Id.* at 663. The Court observed that a decision to award attorneys' fees required that the Court examine the merits of the anti-SLAPP motion, and thus the decision had the finality required for estoppel purposes. *Id.* at 664. For estoppel to apply, there "need not be a judgment on the merits of the complaint . . . ." *Id.* at 665. "Only the issue being argued in the second action had to be fully and finally litigated in the first action." *Id.*

whether the parties were fully heard; (3) whether the court supported its decision with a reasoned opinion; and (4) whether the decision was subject to an appeal." *Id., quoting Border Business Park, Inc. v. City of San Diego* 142 Cal.App.4th 1538, 1564 (2006).

All of these factors weigh in favor of giving the California court's order preclusive effect. It was not tentative. The parties were fully heard. The court issued a formal order, supported by a reasoned opinion. A. 103-110. The order terminated proceedings in the California Superior Court. Gunning's only further option was to appeal. The California court's order was, therefore, a final decision on the merits for purposes of issue preclusion.

Although Gunning concedes that she could have filed for a writ with the California Court of Appeals requesting review of the California Superior Court's ruling, she suggests that she would have lost because the ruling against her did not threaten immediate harm to her or involve loss of a privilege. Blue Br. 25. She cites no authority for the proposition that her odds of success on appeal are relevant in weighing whether the Superior Court's decision was "sufficiently firm" to be afforded the finality necessary for purposes of issue preclusion.

More fundamentally, Gunning does not address the appeal procedures actually applicable to the operative California court order. In California, the Interstate and International Depositions and Discovery Act, Cal. Code of Civil Procedure §§ 2029.100 – 2029.900 governs interstate discovery process and procedures. A. 104 (citing section). Under the Act:

> [A] party to a proceeding in a foreign jurisdiction may obtain discovery in California by retaining a local attorney to issue a subpoena. (§ 2029.350.) If a dispute arises relating to the subpoena, any party may petition the superior court where the discovery is to be conducted for a protective order or an order enforcing, quashing, or modifying the subpoena. (§ 2029.600.) Such an order may be reviewed only by petition to the Court of Appeal for an extraordinary writ. (§ 2029.650, subd. (a).)

Digital Music News LLC v. Superior Court, 226 Cal.App.4th 216, 223, 171 (2014). Section 2029.650(a) provides, in relevant part, "If a superior court issues an order granting, denying, or otherwise resolving a petition under Section 2029.600 or 2029.620, a person aggrieved by the order may petition the appropriate court of appeal for an extraordinary writ." The writ relevant here is mandamus and, in California, "[m]andamus has long been recognized as an appropriate remedy to compel the trial court to require a witness to testify on the stand or by a deposition, or to produce evidence by a subpoena duces tecum." 8 Witkin, Cal. Proc. 5th Writs, § 109 (2008) at 1001. Not only can California appellate courts hear appeals from orders quashing subpoenas involving anonymous speech, but they have

done so. *See, e.g., Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1161 (2008) (deciding appeal from discovery order on subpoena for information to identify anonymous speaker). The effect of the California Superior Court's order was to deprive Gunning of discovery to identify who owned the Crow's Nest website, discovery she needed to serve process and proceed with this litigation. The Maine Superior Court was, therefore, correct that "Gunning could have sought review of [the California Superior Court] decision by filing a petition to the California Court of Appeal for an extraordinary writ."[4] A. 13.

Gunning argues that "the trial court erred in concluding that an extraordinary review of discovery orders in California procedure is equivalent to discretionary appellate review." Blue Br. 25. But the Restatement (Second) of Judgments § 28(1) makes clear that the unappealability exception to the general rule of issue preclusion applies only where a party is "disabled as a matter of law from obtaining review by appeal or, where appeal does not lie, by injunction, extraordinary writ, or statutory review procedure." Comment a to Section 28 explains, "The exception in Subsection (1) applies only when review is precluded as a matter of law. It does not apply in cases where review is available but is not

[4] The Superior Court cites to Code of Civil Procedure § 2019.650(a), but that is a typo. A. 13. The correct section is § 2029.650(a).

sought. Nor does it apply when there is discretion in the reviewing court to grant or deny review and review is denied . . . ." Restatement (Second) of Judgments § 28, cmt. a.

The Restatement says that even if Gunning had sought appellate review and been "denied," the California Superior Court's decision should still be given preclusive effect. Thus, Section 28 sets a "very strict standard for deciding whether the party to be precluded was able to obtain review." *Matter of Lockard*, 884 F. 2d 1171, 1176 n.5 (9th Cir. 1989).

Here, Gunning does not come close to meeting that standard. As mentioned, California provides for review of exactly the sort of order rendered against Gunning pursuant to Cal. Code of Civil Procedure § 2029.650(a). The Restatement calls out "review by . . . extraordinary writ" as sufficient for collateral estoppel purposes. The California Superior Court's decision was subject to review, but Gunning chose not to seek review. Contrary to Gunning's argument, the discretionary nature of that review is not a valid basis for this court to decline to give the California Superior Court's decision preclusive effect.

2. Gunning had an adequate opportunity to litigate in California.

The Court should reject Gunning's argument that her incentive to litigate in the California proceeding – a proceeding she actively contested –

was so inadequate that she should be able to relitigate issues decided in that proceeding.

In assessing whether to apply collateral estoppel to a party who participated in an earlier proceeding, California courts have recognized that a "party must have had an adequate incentive to fully litigate the issue in the prior proceeding . . . ." *Murphy v. Murphy*, 164 Cal. App. 4th 376, 404, 78 Cal. Rptr. 3d 784, 805-06 (2008), *as modified on denial of reh'g* (July 22, 2008). As the California Supreme Court has held, "[i]t is the *opportunity to litigate* that is important in these cases, not whether the litigant availed himself or herself of the opportunity." *Murray v. Alaska Airlines, Inc.*, 50 Cal.4th 860, 869 (2010) at 869 (quotation marks omitted) (emphasis in original); *see also Mass. Sch. of Law v. Am. Bar* Ass'n, 142 F.3d 26, 39 (1st Cir. 1998) ("We do not envision a significantly less latitudinarian test for federal court judgments [than for state judgments]. We hold, therefore, that as long as a prior federal court judgment is procured in a manner that satisfies due process concerns, the requisite 'full and fair opportunity' existed."). Under California law it is incumbent on parties to "protect their own interests" where they have notice of a proceeding, to appear, and to participate in that proceeding. *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.*, 120

Cal.App.3d 622, 631 (1981). A party's "failure to take full advantage of its opportunity to oppose the motion does not warrant refusal to apply collateral estoppel," especially where it is foreseeable that such refusal could result in inconsistent decisions in related pending litigation. *Id.* The Restatement says that denial of a full and fair opportunity to litigate should only be accepted as a defense to collateral estoppel upon "a compelling showing of unfairness." Restatement (Second) of Judgments § 28, cmt j.

Gunning not only had an ample opportunity to litigate in the California proceeding, but also she availed herself of the opportunity. She initiated the California proceeding by issuing a subpoena, which triggered John Doe's motion to quash. She then actively contested John Doe's motion to quash, filed briefs, and appeared through counsel at hearings. She aggressively pressed her demand that the Crow's Nest's internet service provider be ordered to produce the information she demanded. Her claim that she lacked the opportunity to litigate in California conflicts with the fact that she actually did engage in a robust litigation effort.

She argues that she might have been able to get the same information she sought in California from some other source later (Blue Br. at 27), but that does not come close to establishing that she lacked an opportunity to litigate the matter in California and should, therefore, be free to relitigate

issues decided in that jurisdiction. The fact that she had options about how hard to press the California case, including whether to appeal, and might have hoped to somehow get more information later, does not mean that she lacked an opportunity to litigate. It was entirely foreseeable that the outcome of the California proceeding would be used against her in the Maine litigation, which she had already filed and which remained pending.

Gunning has not shown that her incentives and opportunities to litigate in California were so lacking that Maine courts should force John Doe to relitigate the issues decided in California.

3. Gunning does not benefit from the narrow exception to issue preclusion for relitigation of certain issues of law.

Gunning's final argument against application of issue preclusion is that she should not be precluded from relitigating issues of law decided by the California Court. This argument fails for several reasons.

Her argument rests on a provision of the Restatement (Second) of Judgments applicable to offensive use of collateral estoppel, i.e., issue preclusion in subsequent litigation with non-parties. *Id.* § 29. Blue Br. 28-29. This section of the Restatement sets out the general rule that "[a] party precluded from relitigating an issue with an opposing party . . . is also precluded from doing so with another person," and certain exceptions to

that rule. Because Gunning is a party to both this action and to the California action, and the Defendants who filed a motion to quash are the same, Section 29 does not apply in this case. Gunning's argument rests on an inapplicable section of the Restatement. The Court should reject her argument for this reason alone.[5]

The provision of Section 28 relevant to Plaintiff's argument that Maine courts should disregard decisions of law rendered in other jurisdictions is this:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances. . . . The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws.

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[5] Even if the Court does examine the provision of the Restatement cited by Gunning, Section 29(7) (Blue Br. 28-29), the Court should conclude that Gunning does not benefit from that exception. Section 29(7) carves out an exception to issue preclusion against non-parties where "[t]he issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based[.]" Comment (i) elaborates that this section, like Section 28(2) is meant to preserve the Court's ability to revisit prior precedent and make new determinations of the law consistent with principles of stare decisis. The exception is meant to prevent the Court from so doggedly following principles of issue preclusion that a party against whom it is applied is foreclosed in perpetuity from "advancing the contention that stare decisis should not bind the court in determining the issue." *Id.* If Section 29(7) were applicable to issue preclusion in subsequent litigation between parties, it would not apply here. The California Court's decision is not purely one of law. The relevant issue, whether the Crow's Nest is non-actionable parody, is narrow and the typical sort to which issue preclusion applies.

Restatement (Second) of Judgments § 28(2). The comment to this section explains its narrow intended scope. The section is not meant to apply to mixed questions of fact and law. *Id.* Next, the section does not apply to substantially related claims:

> When the claims in two separate actions between the same parties are the same or are closely related—for example, when they involve asserted obligations arising out of the same subject matter—it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion. If the issue has been actually litigated and determined and the determination was essential to the judgment, preclusion will apply. . . . In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of 'law.'

Id. Further, a "new determination is warranted" only when necessary to ensure that issue preclusion does not handicap the Court's ability to revisit prior precedent consistent with principles of stare decisis. "[I]f the issue is one of the formulation or scope of the applicable legal rule, and if the claims in the two actions are substantially unrelated, the more flexible principle of stare decisis is sufficient to protect the parties and the court from unnecessary burdens." *Id.* The comment goes on to say that issue preclusion should not be used to set in stone a rule of law as between two parties "for all time, especially as to claims arising after the first proceeding has been concluded, when other litigants are free to urge that the rule

should be rejected." *Id.* This rule is particularly relevant to government agencies which repeatedly litigate similar issues over long periods of time.

Gunning's situation does not come within this narrow exception. The exception applies only to questions of law, but the California court's decision did not involve a pure question of law. The Court reviewed the statements about Gunning published in the Crow's Nest and assessed whether she had pled a prima facie claim. This involved application of the law to the facts pled in her complaint. The exception applies only to substantially *unrelated* claims, but the California court's decision involves the exact same claims pled in the complaint in this case. Nor is a new determination warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws. The First Amendment applies in Maine just as it does in California. The extent to which parody is protected speech has not changed. This is not the sort of exceptional situation to which Section 28(3) is directed.

III. The Court should adopt the consensus position that defamation plaintiffs must make a heightened legal and evidentiary showing in order to compel disclosure of the identity of an anonymous speaker.

If the Court does not affirm the trial court's decision on collateral estoppel grounds, it should join those jurisdictions that have held that a

defamation plaintiff must make a legal and evidentiary showing in order to compel disclosure of the identity of an anonymous speaker.

The extent of protection to be afforded anonymous speakers is an issue of first impression in Maine, but this is not the first time the Law Court has been asked to address the issue. In *Fitch v. Doe*, 2005 ME 39, ¶ 26, 869 A.2d 722, 729, the Court left open whether to require a "heightened standard" because the "recognized right to anonymous speech" under the First Amendment had not been raised before the trial court. *Id.* In *Fitch*, plaintiff alleged that his identity had been stolen by an anonymous defendant who sent an e-mail from a fictitious "Ronald Fitch" that was damaging to the real Ronald Fitch. *Id.* ¶¶ 3-4. In an effort to discover the identity of the person who sent the e-mail as "Ronald Fitch," the real Fitch sued an internet service provider to force it to identify the person behind the "Ronald Fitch" e-mail. The service provider and counsel for the anonymous "Ronald Fitch" argued against having to disclose the identity of the fictitious "Ronald Fitch," but did not raise a First Amendment objection before the trial court. Because the First Amendment issue had not been preserved for review, the Court found that the argument had been waived. The Court observed, however, that "[o]ther courts have adopted [heightened] standards to ensure that court orders do not infringe

upon the First Amendment and the recognized right to anonymous speech[.]" *Id.* ¶ 27. The Law Court cited the leading case on the subject, *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. App. 2001), and two federal cases *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999).

Dendrite established a five-part standard that has become a model followed throughout the country: (A) *Give Notice*: require the plaintiff to provide reasonable notice to the defendants and an opportunity for them to defend their anonymity; (B) *Require Specificity*: require the plaintiff to allege with specificity the speech at issue; (C) *Ensure Facial Validity*: review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on the speech attributed to each defendant; (D) *Require An Evidentiary Showing*: require the plaintiff to produce evidence supporting each element of the claims; and (E) *Balance the Equities*: weigh the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing First Amendment rights to anonymity. 775 A.2d at 760-61. This test "must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." *Id.* at 756.

State appellate courts in Arizona, Maryland, New Hampshire, Pennsylvania, and Indiana have endorsed the *Dendrite* test as the standard by which to strike the balance between a defamation plaintiff's right to protect reputation and a defendant's right to engage in free speech anonymously, including the final balancing stage.[6]

Other appellate courts have followed *Dendrite*, but have declined to require the final step of the *Dendrite* standard, an explicit balancing of the equities. The leading authority for this position is *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005). In addition to Delaware, California, Texas, the District of Columbia, and Kentucky appellate courts have followed this approach.[7] The Superior Court below agreed with this line of authority. A. 11.

Many federal courts have also employed *Dendrite*-like standards "to benchmark whether an anonymous speaker's identity should be revealed." *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011); *see also, e.g., Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011) ("The case law . . . has begun to coalesce around the basic framework of the test

[6] *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007); *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184, 193 (N.H. 2010); *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011); *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012).

[7] *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. App. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007); *Solers v. Doe*, 977 A.2d 941 (D.C. 2009); *Doe v. Coleman*, 436 S.W.3d 207, 211 (Ky. Ct. App. 2014); *Thomson v. Doe*, 356 P.3d 727 (Wa. App. 2015) (applying modified standard more similar to *Cahill* than to *Dendrite*).

articulated in *Dendrite*," *quoting SaleHoo Group v. Doe*, 722 F. Supp.2d 1210, 1214 (W.D. Wash. 2010)).

Thus, "[m]ost federal and state courts to consider this question have adopted some form of the *Dendrite* and *Cahill* tests." *Thomson*, 356 P.3d at 732-33. A couple of other states, Michigan and Illinois, "have determined that adopting *Dendrite* or *Cahill* would be unnecessary, because their state procedural rules provided equivalent protection." *Id.* at 733. Only one court has significantly strayed from *Dendrite* and *Cahill.* The Virginia Court of Appeals declined to adopt either test, instead deferring to a state statute that required a lower standard of proof to reveal an anonymous speaker's identity. *Id.*; *see Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554, 562 (Va. 2014), *rev'd on other grounds* 770 S.E.2d 440 (2015).

When in 2005 the Law Court in *Fitch* left open the possibility of adopting the *Dendrite* standard to protect the "recognized right to anonymous speech," only New Jersey and a few other courts had addressed that precise issue. The consensus has grown since then that the *Dendrite* test, or something close to it, should be applied before granting a plaintiff's request for court-ordered disclosure of information identifying anonymous speakers. The Law Court should follow the weight of authority by adopting the *Dendrite* standard.

IV. Gunning has not met the heightened standard required to compel disclosure of the identities of the John Does.

The Law Court should find that Gunning has not met the heightened standard required to compel disclosure of the identities of the John Does.

The *Dendrite* standard consists of five elements: (A) notice; (B) specific allegations; (C) facial validity; (D) an evidentiary showing; and (E) a balance of the equities. The first two elements, notice and specificity, are not at issue. The California internet service provider provided notice to the John Does and the complaint alleges with specificity the speech at issue. But Gunning has not met other elements of the *Dendrite* standard, which require that she show that her claims have prima facie merit and that the balance of the equities tips in her favor.

A. Gunning has not stated a prima facie claim.

For the reasons described in Part II of this brief, the Superior Court correctly decided that the California Superior Court has already answered the question whether Gunning has a prima facie defamation case. A. 12-13. The California Court found that she had not because the speech at issue is protected by the First Amendment. *Id.* That court's decision, which is entitled to full faith and credit, estops her from re-litigating that issue anew in Maine. The Court should affirm the decision below on this basis.

If the Court decides against applying issue preclusion in this case and engages in a fresh examination of Gunning's claims on their merits to determine whether she has pled a prima facie case, the Court should come to the same conclusion that the California Superior Court did. The Crow's Nest statements at issue are non-actionable parody and hyperbole, not actionable statements of fact.

1. Parody is non-actionable speech protected by the First Amendment, and must be evaluated in context under an objective reasonable reader standard.

Parody is squarely protected by the First Amendment. It cannot be actionable because it cannot reasonably be interpreted as conveying actual facts. *See Hustler Magazine, Inc. v. Falwell*, 418 U.S. 46, 57 (1988) (a state emotional distress "claim cannot, consistent with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here"); *Victoria Square, LLC v. Glastonbury Citizen*, 891 A.2d 142, 145 (Conn. Sup. Ct. 2006) ("Defamation is, by its nature, mutually exclusive of parody."). A classic example of parody is fake news reporting, a form of expression honed to a fine art by, for example, *The Onion* ("America's Finest News

Source") which has published parody news articles[8] that were so successful that they have been reported as real news by mainstream news media. *See New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 n.7 (Tx. 2004).

This case involves parody speech by a media defendant, the Crow's Nest, involving a local politician and candidate for elected office. Because she was a candidate for public office she is a quintessential public figure. *See Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 686-687 (1989) (candidate for public office is a public figure); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 66 (1st Cir. 2003) ("political candidates unquestionably" fall under the rubric "public figure").

As the Supreme Court has held, statements that "cannot reasonably [be] interpreted as stating actual facts" are entitled to "receive full constitutional protection." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-21 (1990). Statements in this category may involve "loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining" an actual fact, or statements made in a context where the "general tenor of the article" negates the impression that actual

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[8] Recent headlines on The Onion website include, "'I Can't Do This Again,' Shaking, Sweating, Donald Trump Says After Nervously Vomiting Before Rally," "'I Suffer From Severe Psychological Issues and I Need The Help of Mental Health Professionals,' Says Trump in Pointed Debate Comeback," "Clinton Tosses Unpledged Superdelegate in Trunk of Car," and "Clinton Throws Flash Grenade to Divert Attention from Question About Senate Voting Record." *See* www.theonion.com (last visited April 26, 2016).

facts are being asserted. *Id.* at 21. In *Milkovich*, the Court cited its decision in *Hustler Magazine v. Falwell*, 418 U.S. 46, 57 (1988), where it held that the First Amendment barred recovery in an emotional distress claim for an advertisement parody in Hustler Magazine lampooning the sexual background of Rev. Jerry Falwell because parody "could not reasonably have been interpreted as stating actual facts" and was "not reasonably believable." *Id.* The *Milkovich* Court emphasized the need for protecting this sort of speech to ensure "that the public debate will not suffer from lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Id.* at 22.

Under Maine common law, parody, like pure opinion, is not actionable. The Law Court has held, "defamation does not allow recovery for statements of opinion alone." *Lester v. Powers*, 596 A.2d 65, 71 (Me. 1991). "Statements are protected as opinion unless provably false and capable of being reasonably interpreted as making or implying false and defamatory statements concerning actual facts." *Id.* at 71 n.9. This principle is the necessary corollary to the Maine common law rule that a "statement of fact" is "an essential element in an action for defamation." *Lightfoot v. Matthews*, 587 A.2d 462 (Me. 1991) (accusation that members of a board of directors were "lackluster" could not "reasonably be construed

as a statement of objective fact"). Thus, the result is the same whether the First Amendment or Maine common law applies: there is no liability for statements that a reasonable person would conclude are non-factual. *See Mink v. Knox*, 613 F.3d 995, 1012 (10th Cir. 2010) (Gorush, J., concurring) (observing that "state tort law already imposes" limitations on defamation liability for a parody or spoof regardless of First Amendment considerations).

Whether a statement is one of objective fact is ordinarily a question of law. *See Riley v. Harr*, 292 F.3d 282, 291 (1st Cir. 2002) ("[C]ourts treat the issue of labeling a statement as verifiable fact or as protected opinion as one ordinarily decided by judges as a matter of law."); *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 728 (1st Cir. 1992) (affirming Rule 12(b)(6) dismissal of defamation claim based on opinion defense); *Ballard v. Wagner*, 2005 ME 86, ¶ 11, 877 A.2d 1083 (whether a statement is fact is a question of law unless average reader could reasonably understand the statement as either fact or opinion).

As *Falwell* demonstrates, First Amendment immunity for parody extends not just to libel claims, but also to other speech based claims, such as infliction of emotional distress and false light invasion of privacy. *Falwell*, 418 U.S. at 50; *see also Rippett v. Bemis*, 672 A.2d 82, 87-88

(Me.1996) (if statements are privileged, "there can be no recovery for the emotional distress allegedly sustained" and, if not, "any damages sustained . . . are subsumed by any award for defamation"); *Norris v. Bangor Publ. Co.*, 53 F. Supp. 2d 495, 508-09 (D.Me. 1999) (emotional distress claim "grounded solely in Defendant's allegedly defamatory publications" is "swallowed by" defamation claims); *Veilleux v. NBC*, 206 F.3d 92, 134 (1st Cir. 2000) (refusing to allow false light claim to proceed where defamation claim could not); *see also Browning v. Clinton*, 292 F.3d 235, 248 (D.C. Cir. 2002) ("the privileges and defenses applicable to a defamation claim apply to a false light claim based on the same facts"). As a result, all of the claims alleged by Gunning are subject to the same First Amendment defense.

The First Amendment protects speakers engaged in parody, satire, humor, and similar speech "even when [they are] motivated by hatred or ill-will," and even when making "slashing and one-sided" statements that are "outrageous" and "offensive." *Falwell*, 485 U.S. at 53-55 (describing history of "caustic" political caricature beginning with George Washington). The First Amendment protects even those statements of parody, satire or humor that a court may find "gross, unpleasant, crude [and] distorted" and lacking in any "redeeming features whatever." *Pring v. Penthouse Int'l*

Ltd., 695 F.2d 438, 443 (10th Cir. 1983); *see also San Francisco Bay Guardian, Inc. v. Superior Court*, 17 Cal.App.4th 655, 656 (1993) ("[i]t is not for the court to evaluate the parody as to whether it [goes] 'too far'"); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 33 (1st Cir. 1987) ("Although, as we have noted, parody is often offensive, it is nevertheless 'deserving of substantial freedom – both as entertainment and as a form of social and literary criticism.'"); *Yankee Pub. Inc. v. News America Pub. Inc.*, 809 F.Supp. 267, 280 (S.D.N.Y. 1992) ("First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.").

To determine whether a reasonable fact-finder would conclude that a statement is an assertion of objective fact, courts employ a "totality of the circumstances" test. *Lester*, 596 at 71. Under this test, courts must evaluate the context in which a statement is made to determine whether the speech is protected by the First Amendment. *Phantom Touring,* 953 F.2d at 727 ("context in which language appears must be evaluated" in addition to the challenged speech itself). The court must analyze the publication in its entirety; it may not be divided into segments and each portion treated as a separate unit. The court must consider: (1) "whether the general tenor of the entire work negates the impression that the defendant was asserting an

objective fact"; (2) "whether the defendant used figurative or hyperbolic language that negates that impression"; and (3) "whether the statement in question is susceptible of being proved true or false." *Partington v. Bugliosi*, 56 F.3d 1147, 1152-53 (9th Cir. 1995); *see also Riley*, 292 F.3d at 290 (factors are: (1) "the specific statements complained of"; (2) "the general tenor" of the publication; and (3) "the context in which the challenged statements are set"). The question is not whether particular text flagged as objectionable contains "facially assertions of fact" but whether, "because of the context, they would have been understood as part of a satire or fiction." *Ollman v. Evans*, 750 F.2d 970, 1000 (D.C.Cir. 1984); *see also Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir.1980) "The court must consider all the words used, not merely a particular phrase or sentence.").

The reasonable reader standard is a robust one in the context of First Amendment screening of parody, satire, and similar forms of speech:

> As the relevant cases show, the hypothetical reasonable person – the mythic Cheshire cat who darts about the pages of the tort law – is no dullard. He or she does not represent the lowest common denominator, but reasonable intelligence and learning. He or she can tell the difference between satire and sincerity.

Patrick v. Superior Court, 27 Cal.Rptr.2d 883, 887 (Cal.Ct. App. 1994). The reasonable reader is a person of "ordinary intelligence" who "exercises

care and prudence, but not omniscience when evaluating allegedly defamatory communications." *New Times,* 146 S.W.3d at 157. "The appropriate inquiry is objective, not subjective." *Id.* "[T]he question is not whether some actual readers were mislead, as they inevitably will be, but whether the hypothetical reasonable reader could be." *Id.*

Gunning offers no argument on this law in her brief.

2. The Crow's Nest statements about which Gunning complains are non-actionable parody.

The Law Court should conclude, after applying the objectively reasonable reader standard and considering the statements in context, that as a matter of law the challenged statements in the Crow's Nest are non-actionable parody or hyperbole under both the First Amendment and Maine common law.

The particular Crow's Nest article which is the focus of Gunning's claim (A. 67-69) cannot be understood by an objectively reasonable reader as anything other than parody and hyperbole.[9] The Crow's Nest includes a disclaimer on its masthead (on the first page above the article in question) that it is "a parody look at the news." A. 67. This is a clear announcement to readers that the publication is not reporting facts. *See San Francisco Bay Guardian*, 17 Cal.App.4th at 659-660 (fact that phony letter to editor

[9] All of the other statements at issue constitute parody for similar reasons. The Superior Court also focused on this particular statement. A. 12.

was in a section of the newspaper labeled "special parody section" was significant).

The headline "Lindsay Lohan Freeport's Own Marie Gunning" – is a clear indicator that what follows is parody. The comparison of small-town politician to a Hollywood star is obviously absurd, irreverent, and not intended to be taken seriously.

The article describes as "rumor" that Gunning is "suffering from a bipolar disorder with acute depression and paranoia, amplified, by substance abuse." The use of the term "rumor" puts readers on notice that what is being said (in jest) is speculation. *See Lester*, 596 A.2d at 71 (caveating a statement as "totally unsubstantiated fact" supports conclusion that statement is not factual); *Scholz v. Delp*, 473 Mass. 242, 251 (2015) ("the use of cautionary terms in the articles, such as 'may have' and 'reportedly,' relayed to the reader that the authors were 'indulging in speculation'"); *Genesis*, 611 F.2d at 784 ("the court must give weight to cautionary terms used by the person publishing the statement"). A reasonable person would not accept as fact information explicitly flagged as "rumor" in the context of the Crow's Nest.

The inclusion of multiple disorders (bipolar disorder, acute depression, paranoia, and substance abuse) layered one on top of the other

is yet another unmistakable sign that the statement is satirical hyperbole. *See New Times*, 146 S.W.3d 144 at 158 ("exaggeration or distortion" are means by which "the satirist clearly indicates to his audience that the piece does not purport to be a statement of fact but is rather an expression of criticisms or opinion").

The article contains many more indications that is parody. It includes bizarre fabricated statements. It reports that Gunning accused Town employees of having a "conflict of interest" merely by approving anything proposed by the Town Council. A. 68. It suggests that it is somehow a secret that Town employees are "getting paid with thousands of tax payer's dollars" and that "no one wants to talk about it." *Id.* The article includes exaggerated or extreme statements, ascribing to Gunning to the "iron will and force of a bulldozer" and characterizing her as having "snarled." A. 67. The fabricated quotes attributed to Gunning are over-the-top and ludicrous, "I drove that crooked dirt bag manager out of town and that Council is next[;]" "I'll make them sorry they didn't elect me." *Id.* These statements are accompanied by punctuation rarely if ever found in serious news articles, such as multiple exclamation points.

The photographs associated with the article also scream parody. The article is accompanied by photos of Lindsay Lohan in various states of

distress, photos having nothing to do with Gunning. The juxtaposition of local politicians with movie stars, zombies, witches, and other irrelevant imagery is found throughout the Crow's Nest. Even without reading any of the text the images alone indicate that it is not serious news reporting.

The same issue of the Crow's Nest includes other ludicrous articles. The article that appears on the same page as the one about which Gunning complains announces that the Freeport Fire Department "is now in the Whoppie business and we're not talking about pies." A. 67. It goes on to say that the Department is sponsoring "conjugal activities" and "SLEEP OVER'S" at the fire station. This context is important. *See Walko v. Kean College*, 561 A.2d 680, 684 (N.J. Super. Ct. Law Div. 1988) (fact that parody was surrounded by other, humorous articles supported interpretation that reasonable reader would not have taken it seriously).

A "reasonable reader," reviewing the articles in context with associated imagery (which does not depict reality), would not conclude that the Crow's Nest states actual facts about Gunning. The text of the articles reflects that it is "a parody look at the news." The statements about Gunning, including the statement referring to substance abuse or mental illness, are parody and hyperbole protected by the First Amendment and Maine common law.

B. Gunning has not shown that the equities tip in favor of disclosure.

The final prong of *Dendrite* calls for individualized balancing when the plaintiff seeks to compel identification of an anonymous speaker:

> [A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

775 A.2d at 760. This standard is comparable to the test for the grant of a preliminary injunction, where the court considers the likelihood of success and balances the equities. Unlike a preliminary injunction, however, the outcome of discovery to compel disclosure of a speaker's identity is final.

The Court should weigh the strength of plaintiff's evidence, the nature of the allegations, the likelihood of significant damage to the plaintiff, whether plaintiff is a public figure, whether the speech in question relates to issues of public concern, and the nature of the speech (whether the speech is commercial in nature among other salient factors.

The balance here tips in favor of quashing the subpoena. As a candidate for public office and local politician, Gunning is a public figure. *See Harte-Hanks*, 491 U.S. at 686-687. The speech is non-commercial parody speech by a media defendant about a politician, which is entitled to protection of the highest order. Gunning has presented no evidence of

economic damage, nor would it be reasonable to conceive of any monetary harm to her as a result of the obvious parody in the Crow's Nest. The Crow's Nest is no longer available on the Internet and, therefore, any potential harm to Gunning is mitigated by the fact that the statements are no longer available. On the other hand, the Crow's Nest has ridiculed many figures in Freeport and disclosure of the identities of those who wrote or published it could harm them in many ways, and chill the speech of others who might only be willing to criticize local figures anonymously.

Even if the Court declines to give preclusive effect to the California Court's decision and declines to rule that the Complaint fails to state a prima facie claim, Gunning's likelihood of success is too remote to outweigh Defendants' constitutionally protected right to anonymous parody speech.

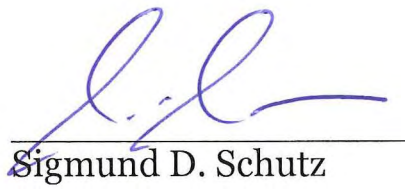
CONCLUSION

Appellee John Doe respectfully requests that the Court affirm the Superior Court's Order dismissing this case under M.R.Civ.P. 3.

Dated at Portland, Maine, this 29th day of April, 2016.

Respectfully Submitted,
Appellee John Doe

By John Doe's/her Attorneys,
PRETI FLAHERTY BELIVEAU &
PACHIOS, LLP



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CERTIFICATE OF SERVICE

I, Sigmund D. Schutz, Attorney for John Doe certify that I have, this date, mailed two copies of the Brief of Appellee to the Attorneys listed below, by United States Mail, first-class, postage prepaid, addressed as follows:

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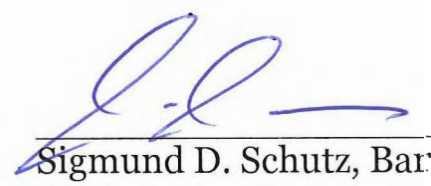
Dated: April 29,2016



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ADDENDUM

Superior Court of California, County of San Francisco

Case Number: CPF 13 513271
Title: IN RE: JOHN DOE I et al
Cause of Action: OTHER CIVIL PETITIONS
Generated: Apr-27-2016 09:40 am

Register of Actions

Date Range: First Date OCT-18-2013 Last Date MAR-05-201 (Dates must be entered as MMM-DD-YYYY)

Submit

Ascending Date Sequence

Date	Proceedings	Document	Fee
OCT-18-2013	PETITION FILED BY PETITIONER DOE I, JOHN DOE II, JOHN AS TO RESPONDENT GUNNING, MARIE	View	450.00
OCT-18-2013	NOTICE OF HEARING ON PETITION TO QUASH SUBPOENA [CCP 2029.600, 1987.1, 1987.2) FILED BY PETITIONER DOE I, JOHN DOE II, JOHN HEARING SET FOR NOV-15-2013 AT 09:00 AM IN DEPT 302		60.00
OCT-18-2013	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FILED BY PETITIONER DOE I, JOHN DOE II, JOHN		
OCT-18-2013	DECLARATION IN SUPPORT OF MOTION FILED BY PETITIONER DOE I, JOHN DOE II, JOHN		
OCT-18-2013	REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION		
OCT-18-2013	COMPENDIUM OF FEDERAL AUTHORITIES IN SUPPORT OF PETITION TO QUASH FILED BY PETITIONER DOE I, JOHN DOE II, JOHN		
OCT-25-2013	POS OF CIVIL CASE COVER SHEET; NTC OF HEARING ON PETITION TO QUASH; PETITION TO QUASH; MEMO OF P & A; DEC.'S ETC FILED BY PETITIONER DOE I, JOHN DOE II, JOHN	View	
OCT-31-2013	FEE PAID ON STIP AND [PROPOSED] ORDER CONTINUING HEARING DATE FOR PETITION TO QUASH SUBPOENA AND RELATED BRIEFING DATES FILED BY RESPONDENT GUNNING, MARIE		450.00
NOV-04-2013	ORDER AND STIPULATION TO CONTINUE HEARING DATE FOR PETITION TO QUASH SUBPOENA AND RELATED BRIEFING DATES	View	
NOV-04-2013	DISCOVERY 302, NOTICE OF HEARING ON PETITION TO QUASH SUBPOENA [CCP 2029.600, 1987.1, 1987.2) CONTINUED FROM NOV-15-2013 TO DISCOVERY AT NOV-22-2013, 9:00 AM IN DEPT. 302 PER ORDER ON STIPULATION. (D302)		
NOV-08-2013	DECLARATION OF MARIE GUNNING IN SUPPORT OF OPPOS TO DEFTS PETITITON TO QUASH SUBPOENA FILED BY RESPONDENT GUNNING, MARIE		
NOV-08-2013	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOS TO DEFTS PETITITON TO QUASH SUBPOENA FILED BY RESPONDENT GUNNING, MARIE		

NOV-08-2013	PROOF OF SERVICE FILED BY RESPONDENT GUNNING, MARIE		
NOV-15-2013	REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION TO QUASH SUBPOENA FILED BY PETITIONER DOE I, JOHN DOE II, JOHN		
NOV-15-2013	SUPPLEMENTAL DECLARATION OF JOHN DOE 1 IN SUPPORT OF PETITION TO QUASH SUBPOENA FILED BY PETITIONER DOE I, JOHN DOE II, JOHN		
NOV-15-2013	SUPPLEMENTAL DECLARATION OF PAUL CLIFFORD 1 IN SUPPORT OF PETITION TO QUASH SUBPOENA FILED BY PETITIONER DOE I, JOHN DOE II, JOHN		
NOV-15-2013	SUPPLEMENTAL COMPENDIUM OF FEDERAL AND OTHER AUTHORITIES IN SUPPORT OF PETITION TO QUASH SUBPOENA FILED BY PETITIONER DOE I, JOHN DOE II, JOHN		
NOV-15-2013	PROOF OF SERVICE OF REPLY PAPERS FILED BY PETITIONER DOE I, JOHN DOE II, JOHN SERVED NOV-15-2013, MAIL ON RESPONDENT GUNNING, MARIE		
NOV-25-2013	MINI MINUTES FOR NOV-22-2013 09:00 AM FOR DEPT 302		
NOV-26-2013	DISCOVERY 302, NOTICE OF HEARING ON PETITION TO QUASH SUBPOENA [CCP 2029.600, 1987.1, 1987.2) CONTINUED FROM NOV-22-2013 TO LAW AND MOTION AT DEC-11-2013, 9:30 AM IN DEPT. 302 (D302)		
DEC-11-2013	ORDER GRANTING JOHN DOE 1 AND JOHN DOE 2'S PETITION TO QUASH SUBPOENA	View	
DEC-11-2013	LAW AND MOTION 302, PETITIONERS JOHN DOE I AND JOHN DOE II'S PETITION TO QUASH SUBPOENA IS GRANTED. PETITIONERS' REQUEST FOR JUDICIAL NOTICE IS GRANTED. ORDER SIGNED IN OPEN COURT. [SEE MINI MINUTES FOR DETAILS.] JUDGE: MARLA J. MILLER, CLERK: LESLEY FISCELLA, NOT REPORTED.		
DEC-11-2013	MINI MINUTES FOR DEC-11-2013 09:30 AM FOR DEPT 302		
JAN-24-2014	EX PARTE APPLICATION FOR ORDER ISSUANCE OF CORRECTED ORDER GRANTING JOHN DOE 1 AND JOHN DOE 2'S PETITION TO QUASH SUBPOENA, DECLARATION FILED BY PETITIONER DOE I, JOHN DOE II, JOHN		60.00
JAN-24-2014	ORDER GRANTING JOHN DOE 1 AND JOHN DOE 2 EX-PARTE APPLICATION FOR ISSUANCE OF CORRECTED ORDER GRANTING PETITION TO QUASH SUBPOENA	View	
JAN-24-2014	ORDER (AMENDED) GRANTING JOHN DOE 1ND JOHN DOE 2'S PETITION TO QUASH SUBPOENA	View	
JAN-27-2014	NOTICE OF ENTRY OF ORDER/NOTICE OF RULING FILED FILED BY PETITIONER DOE I, JOHN DOE II, JOHN	View	
JAN-29-2014	NOTICE OF ENTRY OF ORDER/NOTICE OF RULING FILED GRANTING EX PARTE APPLICATION FOR ISSUANCE OF CORRECTED ORDER GRANTING PETITION TO QUASH SUBPOENA FILED BY PETITIONER DOE I, JOHN DOE II, JOHN	View	
JAN-29-2014	NOTICE OF ENTRY OF ORDER/NOTICE OF RULING FILED (AMENDED ORDER) GRANTING JOHN DOE1 AND JOHN DOE 2'S PETITION TO QUASH SUBPOENA FILED BY PETITIONER DOE I, JOHN DOE II, JOHN	View	
MAR-05-2014	STIPULATION REGARDING SETTLEMENT OF ATTORNEY'S FEES AND COSTS FILED BY DOE I, JOHN DOE II, JOHN GUNNING, MARIE		